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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1027

ALABAMA ELECTRIC COOPERATIVE, INC., PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, ALABAMA POWER COMPANY, AND THE SOUTHERN COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–5a) is reported at 353 F. 2d 905. The opinion of the Securities and Exchange Commission is not yet reported. It appears at page 113–124 of the Joint Appendix prepared for the use of the court of appeals.[1]

[1] References to the record as contained in Joint Appendix are cited as "JA".

JURISDICTION

The judgment of the court of appeals was entered on November 24, 1965. The petition for a writ of certiorari was filed on February 16, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 15 U.S.C. 79x.

STATUTE INVOLVED

The relevant sections of the Public Utility Holding Company Act of 1935, 49 Stat. 803, *et seq.*, 15 U.S.C. 79a *et seq.*, are set forth as Appendix B to the petition except Section 7 of the Act, which is set forth in the Appendix hereto, *infra*, pp. 12–16.

QUESTION PRESENTED

Whether the Securities and Exchange Commission, in exercising its authority to approve sales and acquisitions of securities by registered holding companies and their subsidiaries under the Public Utility Holding Company Act of 1935, is required to consider the imposition of conditions prohibiting the construction of allegedly duplicative local electric service facilities that have been approved by the appropriate State authority.

STATEMENT

The Southern Company ("Southern") is a public utility holding company registered as such with the Securities and Exchange Commission pursuant to the Public Utility Holding Company Act of 1935. It owns all of the common stock of Alabama Power Company ("Alabama Power"), an Alabama corpo-

ration which owns and operates facilities for the generation, transmission and distribution of electricity within that State. Alabama Electric Cooperative, Inc. ("the Cooperative"), petitioner herein, is an electric cooperative which, in some geographical areas, is in competition with Alabama Power (JA 109).

On October 28, 1964, Alabama Power petitioned the Alabama Public Service Commission ("Alabama Commission") for authority to issue additional common stock and other securities to obtain funds to finance construction of generating plants and related facilities, to permit enlargement of its existing plant facilities, transmission and distribution lines and for other purposes (JA 17–24). The Cooperative was permitted to intervene and to participate fully in that proceeding, where it presented its views that unqualified approval by the Alabama Commission would result in the use of some of the funds for construction of facilities duplicating certain facilities of the Cooperative to the detriment of the Cooperative and the public.[2] It asked that approval either be denied or conditioned so that the funds obtained would not be used to duplicate the Cooperative's existing facilities (JA 111–112). Notwithstanding the Cooperative's presentation, on November 25, 1964, the Alabama Commission issued an order approving the transactions without the requested qualification, finding that the proposed transactions were "com-

[2] The Cooperative had intervened for like reasons in connection with prior financing applications made by Alabama Power (JA 38–39, n. 3).

patible with the public interest" and were "necessary, appropriate for and consistent with the proper performance by [Alabama Power] of its service to the public * * * and [would] not impair its ability to perform that service; and [were] reasonably necessary and appropriate for such purposes" (JA 27).[3]

On January 22, 1965, Southern, Alabama Power and other operating subsidiaries of Southern, filed a joint application with the Securities and Exchange Commission under the Public Utility Holding Company Act ("the Act") seeking, *inter alia,* an order of exemption under Section 6(b) for the issuance and sale of 140,000 shares of common stock by Alabama Power to Southern for the purposes approved and authorized by the Alabama Commission, and approval under Section 10 of the acquisition of such shares by Southern (JA 1–16). The application stated that, since Alabama Power's common stock was to be issued solely for the purpose of financing its business and since the sale had been expressly approved by the Alabama Commission, Alabama Power was entitled to the exemption provided by Section 6(b) of the Act from the requirements of Section 7 of the Act (JA 8). The application also set forth facts indicating that Southern had complied with the provisions of the Act applicable to securities acqui-

[3] One member of the Alabama Commission dissented in part from the order on the specific ground that a condition precluding duplication of existing facilities was not being imposed (JA 29–30). The Cooperative has appealed the order to the courts of Alabama (JA 38–39, n. 3).

sitions, *i.e.*, Sections 9(a), 10, and 12(f) (see JA 8).

On February 4, 1965, the Securities and Exchange Commission, pursuant to its Rule 23,[4] gave public notice of the proposed transactions, indicating that the application might be granted in due course unless the Commission, on application of any interested person, should find that a hearing was appropriate (JA 31–33).

On March 1, 1965, the Cooperative petitioned to intervene before the Securities and Exchange Commission and asked that a hearing be held (JA 35–44). The petition set forth substantially the same matters as the Cooperative had presented to the Alabama Commission. It complained that a portion of the proceeds of the financing would be employed to duplicate certain of the Cooperative's lines and facilities (JA 38, 41–42). It asked the Securities and Exchange Commission, as it had previously and unsuccessfully asked the Alabama Commission, to provide such limitations on the use of the proceeds as would preclude duplication of facilities (JA 42). It asserted that this could be accomplished by the Securities and Exchange Commission exercising its discretion pursuant to Section 6(b), 7 or 10 of the Act to impose terms and conditions upon the financing (JA 40–41).

On June 1, 1965, the Securities and Exchange Commission issued the order under review (JA 123–124),[5]

[4] 17 C.F.R. 250.23.

[5] The proposed financing by Southern and its other subsidiaries, not questioned by the Cooperative, had been approved

holding that the Act did not contemplate that the Commission "may determine, either directly or through the imposition of conditions, whether one or another public-utility company is the better qualified to provide electric service in a particular local community, or whether local consumers should or should not be provided a competitive choice of services" (JA 117). Such questions, the Commission held, were "to be determined by the appropriate licensing or franchise authorities, in this case the Alabama Commission, from which Alabama Power holds a certificate of convenience and necessity and which has disagreed with the very arguments that the Cooperative's petition presents in the proceeding before us" (*ibid.*). Accordingly, the joint application was granted and the Cooperative's petition for leave to intervene was denied (JA 122–124). The Court of Appeals for the District of Columbia Circuit unanimously affirmed the Commission's order (Pet. 1a–5a).

ARGUMENT

The decision of the court of appeals affirming the order of the Securities and Exchange Commission is clearly correct, and it is not in conflict with any decision of this or any other Court.

1. Under Section 6(b) of the Act the Commission may authorize certain securities transactions "subject

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by Commission order of March 11, 1965 (R. 141–144). That order had reserved jurisdiction with respect to the matters raised by the Cooperative's petition.

to such terms and conditions as it deems appropriate in the public interest or for the protection of investors or consumers." Petitioner contends (Pet. 10) that this requires the Commission to consider and evaluate all factors bearing on the public interest including the public advantage or harm resulting from the use of the proceeds of such transactions to construct duplicative facilities though such construction has been approved by the appropriate State regulatory agency. Both the Commission and the court of appeals held that, in the context of the Public Utility Holding Company Act, the words "public interest" have a narrower significance. They both observed (JA 116; Pet. 4a) that "Words like 'public interest' and the interest of 'investors or consumers,' though of wide generality, take their meaning and definition from the substantive provisions and purposes of the Act."

The scope and significance of the words "public interest" appearing in Section 6(b) and elsewhere in the Act are properly understood in terms of the abuses attending the use of the holding-company device in the public-utility field which the Act was intended to remedy.[6] Such abuses, which are de-

[6] Even authorities cited by petitioner show that terms such as "public interest" are not to be interpreted as establishing a standard of administrative jurisdiction so indefinite as to confer unlimited power but are to be given a more restricted meaning appropriate to the statutory context in which they appear. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 216. See *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 82 (Pet. 9).

scribed in Section 1(b), include improper intercompany transactions and affiliations, unsound financial structures, fictitious asset values, lack of uniform standard accounts and the absence of arms-length bargaining between holding company and subsidiary. The Act authorizes the Commission to protect the public interest by the elimination of these and other evils enumerated in that section.

Wholly irrelevant here are concepts of the public interest derived from statutes which, unlike the Act, confer on other agencies powers traditional to public utility regulation such as fixing reasonable and nondiscriminatory rates, determining the level of service and the persons entitled thereto, and granting or withholding franchises or certificates of public convenience and necessity. The Commission quite properly pointed out that (JA 116–117):

> * * * The provisions in Sections 6 and 7 are concerned with securities to be issued by a registered holding company or any subsidiary thereof. Our jurisdiction thereunder extends to the type, amount, price and other terms of the securities which such company proposes to issue for the purpose of financing the business in which it is lawfully engaged. * * * But neither these nor any other sections of the Act contemplate that we may determine, either directly or through the imposition of conditions, whether one or another public-utility company is the better qualified to provide electric service in a particular local community, or whether local consumers should or should not be provided a competitive choice of services. * * *

It seems apparent that the words on which petitioner relies, considered in the context of the Public Utility Holding Company Act, simply will not bear the expansive and radically new meaning which petitioner would attach to them.[7]

2. Although broad federal control over holding company systems is provided by the Holding Company Act, it is not, as suggested by petitioner, a comprehensive scheme of utility regulation. The purpose of the Act is to deal with problems and abuses which attend the existence of the interstate holding company device in the public utility field and, in so doing, to eliminate and prevent conditions which "make difficult, if not impossible, effective State regulation of public-utility companies." Section 1(a). Conspicuous by its absence from the regulatory scheme is any grant of authority to the Commission which would supplant traditional public utility regulation by the States. The statute itself affirmatively indicates a national public interest in unimpaired State regulation of utility operating functions,[8] and the legislative history of the Act is replete with statements indicating that effective State control of local matters was to be enhanced rather than restricted by the statute

[7] *Securities and Exchange Commission* v. *New England Electric System*, certiorari granted, 382 U.S. 953 (No. 636), to be argued this Term, does not involve the determination of the phrase "public interest" and the issues involved herein are in no way related to any question which this Court will be required to pass upon in that case.

[8] See Sections 1(a), 1(b)(1), 1(b)(2), 1(b)(3) and 1(b)(5). Cf. Sections 6(b), 7(g), 8, 9(b), 10(f) and 21. Compare Section 3(a).

and that no usurpation of traditional State utility regulation was to occur.[9] It is significant in this regard that to enforce this Act the Congress did not choose an agency such as the Federal Power Commission, expressly created to regulate utility operating functions, but chose instead the Securities and Exchange Commission, whose specialized experience was largely in the financial field. It is further significant that the agency so selected, in some thirty years of administration of the Act, has not found it necessary to assert the kind of utility-regulation jurisdiction which petitioner now suggests is an essential ingredient of the statutory scheme. See *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U.S. 349, 351–352.

The authority of a federal agency to extend its power into areas of traditional State regulation may not be found by inference, as petitioner's contentions would require, but only from a clear congressional expression of such purpose. See, *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, 152; *Yonkers* v. *United States*, 320 U.S. 685, 691; *Palmer* v. *Massachusetts*, 308 U.S. 79. Neither the provisions of the Holding Company Act nor its legislative history reflect an expression of such purpose; indeed, from the foregoing it is manifest that congressional expressions are uniformly to the contrary.

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[9] See, *e.g.*, Report of National Power Policy Committee, H. Doc. No. 137, 74th Cong., 1st Sess., p. 3 (President's Message) (1935); *id.* at pp. 7–8; Report of the Committee on Interstate Commerce, S. Rep. No. 621, 74th Cong., 1st Sess., p. 4 (1935).

CONCLUSION

The decision below is clearly correct. There is no conflict or need for further review. The petition for certiorari should be denied.

Respectfully submitted.

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MARCH 1966.

APPENDIX

Section 7 of the Public Utility Holding Company Act of 1935, 49 Stat. 815, 15 U.S.C. 79g, reads as follows:

DECLARATIONS BY REGISTERED HOLDING AND SUBSIDIARY COMPANIES IN RESPECT OF SECURITY TRANSACTIONS

SEC. 7. (a) A registered holding company or subsidiary company thereof may file a declaration with the Commission, regarding any of the acts enumerated in subsection (a) of section 6, in such form as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers. Such declaration shall include—

(1) such of the information and documents which are required to be filed in order to register a security under section 7 of the Securities Act of 1933, as amended, as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers; and

(2) such additional information, in such form and detail, and such documents regarding the declarant or any associate company thereof, the particular security and compliance with such State laws as may apply to the act in question as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers.

(b) A declaration filed under this section shall become effective within such reasonable period of time after the filing thereof as the Commission shall fix by rules and regulations or order, unless the Commission prior to the expiration of such period shall have issued an order to the declarant to show cause why such declaration should become effective. Within a reasonable time after an opportunity for hearing upon an order to show cause under this subsection, unless the declarant shall withdraw its declaration, the Commission shall enter an order either permitting such declaration to become effective as filed or amended, or refusing to permit such declaration to become effective. Amendments to a declaration may be made upon such terms and conditions as the Commission may prescribe.

(c) The Commission shall not permit a declaration regarding the issue or sale of a security to become effective unless it finds that—

(1) such security is (A) a common stock having a par value and being without preference as to dividends or distribution over, and having at least equal voting rights with, any outstanding security of the declarant; (B) a bond (i) secured by a first lien on physical property of the declarant, or (ii) secured by an obligation of a subsidiary company of the declarant secured by a first lien on physical property of such subsidiary company, or (iii) secured by any other assets of the type and character which the Commission by rules and regulations or order may prescribe as appropriate in the public interest or for the protection of investors; (C) a guaranty of, or assumption of liability on, a security of another company; or (D) a receiver's or trustee's certificate duly au-

thorized by the appropriate court or courts; or

(2) such security is to be issued or sold solely (A) for the purpose of refunding, extending, exchanging, or discharging an outstanding security of the declarant and/or a predecessor company thereof or for the purpose of effecting a merger, consolidation, or other reorganization; (B) for the purpose of financing the business of the declarant as a public-utility company; (C) for the purpose of financing the business of the declarant, when the declarant is neither a holding company nor a public-utility company; and/or (D) for necessary and urgent corporate purposes of the declarant where the requirements of the provisions of paragraph (1) would impose an unreasonable financial burden upon the declarant and are not necessary or appropriate in the public interest or for the protection of investors or consumers; or

(3) such security is one the issuance of which was authorized by the company prior to January 1, 1935, and which the Commission by rules and regulations or order authorizes as necessary or appropriate in the public interest or for the protection of investors or consumers.

(d) If the requirements of subsections (c) and (g) are satisfied, the Commission shall permit a declaration regarding the issue or sale of a security to become effective unless the Commission finds that—

(1) the security is not reasonably adapted to the security structure of the declarant and other companies in the same holding-company system;

(2) the security is not reasonably adapted to the earning power of the declarant;

(3) financing by the issue and sale of the particular security is not necessary or appropriate to the economical and efficient operation of a business in which the applicant lawfully is engaged or has an interest;

(4) the fees, commissions, or other remuneration, to whomsoever paid, directly or indirectly, in connection with the issue, sale, or distribution of the security are not reasonable;

(5) in the case of a security that is a guaranty of, or assumption of liability on, a security of another company, the circumstances are such as to constitute the making of such guaranty or the assumption of such liability an improper risk for the declarant; or

(6) the terms and conditions of the issue or sale of the security are detrimental to the public interest or the interest of investors or consumers.

(e) If the requirements of subsection (g) are satisfied, the Commission shall permit a declaration to become effective regarding the exercise of a privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security unless the Commission finds that such exercise of such privilege or right will result in an unfair or inequitable distribution of voting power among holders of the securities of the declarant or is otherwise detrimental to the public interest or the interest of investors or consumers.

(f) Any order permitting a declaration to become effective may contain such terms and conditions as the Commission finds necessary to assure compliance with the conditions specified in this section.

(g) If a State commission or State securities commission, having jurisdiction over any

of the acts enumerated in subsection (a) of section 6, shall inform the Commission, upon request by the Commission for an opinion or otherwise, that State laws applicable to the act in question have not been complied with, the Commission shall not permit a declaration regarding the act in question to become effective until and unless the Commission is satisfied that such compliance has been effected.

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IN THE

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OCTOBER TERM, 1965

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS ALABAMA POWER COMPANY AND THE SOUTHERN COMPANY IN OPPOSITION

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